

ZEUS SERVICE, S.A. v. L.A. WROTEN CO., INC.
PACA Docket No. R-98-0062.
Order of Dismissal.
Filed August 27, 2001.

Attorney Fees, effect of dismissal without prejudice on award.

Where a Chilean complainant, who had posted the double bond required by section 6(e) of the Act, requested a voluntary dismissal of its complaint due to the refusal of two of its key witnesses to come from Chile to attend the hearing in the United States, a dismissal without prejudice was ordered, and Respondent was, therefore, not the prevailing party under the fee-shifting provision of section 6(e).

George S. Whitten, Presiding Officer.
Lawrence H. Meuers, for Complainant.
Stephen P. McCarron, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant sought an award of reparation in connection with a contract to consign 128,000 boxes of Chilean sweet onions to Respondent for sale in the United States. In the formal complaint Complainant sought damages for unauthorized deductions allegedly made by Respondent in the amount of \$124,492.54 (Count I), for breach of contract by the refusal to accept the balance of the onions in the amount of \$794,784.03 (Count II), and for negligent sale of the onions received in the amount of \$268,125.60 (Count III).

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Thereafter, depositions were taken, and, following many delays, the matter was set for oral hearing in Florida. Approximately six weeks before the oral hearing was scheduled to begin Complainant encountered difficulty in getting two Chilean witnesses to attend, and requested that their testimony be taken by video conference at Complainant's expense. Respondent opposed this request on the grounds that the credibility of these witnesses was crucial to the outcome of the case, the language barrier would be exacerbated if the testimony was received by video conference, and that Respondent felt it necessary that it be allowed to cross-examine the two witnesses in person. For the reasons put forward by Respondent the presiding officer denied Complainant's request. Complainant then filed a motion for voluntary dismissal of the complaint. Respondent objected to the dismissal of the complaint on the ground that Complainant, as a non-resident of the United States was required,

pursuant to section 6(e) of the Act¹, to post a bond in double the amount of its claim conditioned on the payment of costs, including a reasonable attorney's fee if respondent prevailed. Respondent maintained that by reason of Complainant's voluntary dismissal Respondent had prevailed and was entitled to attorney fees. The presiding officer gave both parties opportunity to brief the issue.

In contrast to section 7(a) of the Act, section 6(e) does not require that an oral hearing take place for an award of attorney fees to the prevailing party to be made. In spite of this, Complainant, in its brief, seeks to apply section 47.19(d) of the Rules of Practice to this situation. However, such an application is not possible since that section was implemented in direct consequence of the passage of the fees and expenses provision of section 7(a) of the Act, and relates only to that section. There is no provision in the Rules of Practice that relates to the "payment of costs, including a reasonable attorney's fee" under section 6(e) of the Act. However, the award of costs and attorney fees are clearly authorized under that section of the Act.

A more central question to this case is whether Respondent should be deemed to have prevailed in this proceeding as a result of Complainant's voluntary dismissal of its complaint. A voluntary dismissal is generally without prejudice under the Federal Rules of Civil Procedure.² As Moore points out:

This leaves the plaintiff free to refile the action at a later date and does not in any way alter the legal relationship between the parties. As such, a dismissal without prejudice does not render the defendant a prevailing party for purposes of the fee-shifting statutes.³

¹ 7 U.S.C. 499f. The section reads as follows: "In case a complaint is made by a nonresident of the United States, or by a resident of the United States to whom the claim of a nonresident of the United States has been assigned, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter claim by respondent: Provided, That the Secretary shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond."

² See Fed. R. Civ. P. 41(a). The Federal Rules of Civil Procedure are, of course, not applicable to this administrative proceeding. However, for purposes of the application of the fee-shifting provisions of section 6(e) of the Act, the way in which the Rules deal with voluntary dismissals, together with the federal case law as to the consequences for fee-shifting, is analogous and compelling.

³ 10 Moore's Federal Practice, § 54.171[3][c][iv] (Matthew Bender 3d ed.).

The case cited by Moore⁴ concerned a voluntary dismissal under Rule 41(a)(1)(i). Dismissals under 41(a)(2) are also without prejudice unless specified in the order of the district court. In this case Complainant was intent on the prosecution of its case until two of its key witnesses refused to come to the United States from Chile to testify. Complainant urged that the testimony of these witnesses be taken by video conference, and we declined to order such testimony at Respondent's request. Complainant's request for voluntary dismissal, therefore, says nothing as to the merits of its case, and such dismissal will be granted without prejudice. Since the dismissal will be without prejudice, we cannot say that Respondent has prevailed in this proceeding, and we cannot award costs or attorney fees to Respondent.

Order

The complaint is dismissed without prejudice.
Copies of this order shall be served upon the parties.

⁴*Szabo Food Serv. v. Canteen Corp.*, 823 F2d 1073 (7th Cir. 1987) *cert. dismissed*, 485 U.S. 901 (1988).